



## David E. Clarenbach

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SPEAKER PRO TEM OF THE ASSEMBLY

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January 28, 1988

The Faculty Senate  
Room 134 Bascom Hall  
University of Wisconsin  
Madison, WI 53706

Dear Members of the UW-Madison Faculty Senate:

In the past few months the University has been struggling with the difficult issue of R.O.T.C. programs on campus and their conflict with State law and University non-discrimination policies. My purpose is not to tell the Faculty Senate how to vote, but rather to point-out some information regarding the requirements of land grant colleges.

As you probably know, the "Land Grant Act" of 1862 requires that colleges benefiting from the act include instruction in "military tactics" among other areas. I am sure that there is concern that this requirement may not be satisfied if, somewhere down the line, the R.O.T.C. contracts are not renewed.

There is, however, a provision in the act that allows State Legislatures to prescribe what exactly needs to be taught in each of the required areas:

"at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the Legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life."

David E. Clarenbach

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SPEAKER PRO TEM OF THE ASSEMBLY

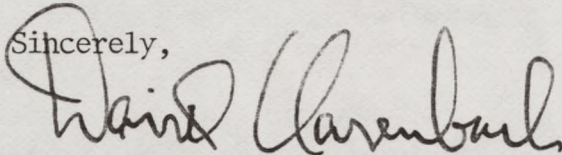
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I want to assure the Faculty Senate that there are legislators, including those who co-signed a recent letter on this subject, willing to work with the University to devise an alternative, non-discriminatory program to satisfy the act.

There is no conflict with land grant constraints and you may make your decision free from fear of noncompliance with federal law.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "David Clarenbach". The signature is written in dark ink and is positioned to the right of the word "Sincerely,".

David Clarenbach  
State Representative

**REPORT OF THE AD HOC COMMITTEE ON RELATIONSHIP  
BETWEEN THE UNIVERSITY OF WISCONSIN-MADISON AND ROTC PROGRAMS  
IN REGARD TO UNIVERSITY NONDISCRIMINATION POLICIES**

**PART I: BACKGROUND, CONCLUSIONS AND RECOMMENDATIONS**

The Ad Hoc Committee was charged by the University Committee, pursuant to the mandate of the Faculty Senate, to examine the relationship between the University of Wisconsin-Madison and the Reserve Officer Training Corps programs in regard to nondiscrimination policies of the University. Early in the committee deliberations it was agreed that the study was intended to focus on the issue of discrimination based on sexual preference as it relates to ROTC at the University of Wisconsin-Madison. The study and this report is addressed to this issue.

The Ad Hoc Committee started its study by obtaining as much background information as possible. Included were prior faculty documents,<sup>1</sup> the relevant Wisconsin Statutes and related advisory opinion of the Wisconsin Attorney General,<sup>2</sup> ROTC contract agreements between the University of Wisconsin-Madison and the three military services,<sup>3</sup> and the policies on ROTC by the services through their regulations.<sup>4</sup> Other specific documents and data available were obtained, reviewed and discussed.

**Reserve Officer Training Corps**

The policy of ROTC, set by the Army, Navy and Air Force, follows Department of Defense (DOD) Directive 1332.14, 32 C.F.R. part 41, called "Enlistment Administrative Separations." It defines the word "homosexual" to mean "a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts." The broad scope of the directive has been interpreted as including anyone admitting to being lesbian or gay, associating with those known or suspected of being lesbian or gay, frequenting a gay/lesbian-identified establishment, or owning gay/lesbian-oriented literature. Other Department of Defense (DOD) documents declare all such persons as unfit to serve in the military and subject to immediate discharge procedures.

There are three ROTC units on the UW-Madison campus, each operating through a University department. The Army unit corresponds to the Department of Military Science; the Navy: Naval Science; the Air Force: Air Force Aerospace Studies. As instructors in these departments must be from the armed forces, lesbians or gays are effectively excluded from these positions. In addition, lesbian or gay students are prohibited from attaining cadet status in ROTC programs and from receiving the associated ROTC scholarships.

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1. Faculty Assembly Document 51, Report of the Ad Hoc Subcommittee on the Nelson Report, as amended on March 23, 1970, with the attached Report of the Ad Hoc Committee on ROTC Organization and Structure, October 23, 1969 (The Nelson Report).

Faculty Document 38, Report of the Ad Hoc Committee on ROTC, 5 April 1971.

Faculty Document 38A, Report of the ROTC Policy Committee, 5 April 1971.

Faculty Document 542, Report to the University Committee of the Ad Hoc Study Committee on Adherence to University Policies on Placement and Nondiscrimination, 5 December 1983.

Faculty Document 621, Report of the Ad Hoc Study Committee on Adherence to University Policies on Placement and Nondiscrimination, 7 October 1985.

2. Chapter 112, Laws of 1981, which amend Section 16.765, Wisconsin Statutes, and the April 3, 1983 Wisconsin Attorney General Advisory Opinion that the University ROTC program is not within the scope of Section 16.765 as states may not regulate activities of the federal government.

3. Air Force ROTC, 28 October 1981, Naval ROTC, 1 July 1986, and Army ROTC, 19 March 1967.

4. For the Department of Defense this is Directive 1332.14 32 C.F.R., for Army this is primarily Army Regulation 601-210, for the Navy this is primarily Secretary of the Navy Instruction 1900.9D, and for the Air Force this is primarily Air Force ROTC Regulation 45-10, Air Force Regulations 33-3, 39-10, and 160-43.

The University of Wisconsin-Madison's officer education programs embrace two distinct components:

1. Earning a bachelor's degree in a recognized academic field under standards exclusively set by the University of Wisconsin-Madison;
2. Earning a commission in one of the armed forces of the United States by meeting educational, physical and psychological standards exclusively established by national law.

It is the commissioning standards that are examined here because any student who is academically qualified can take any course offered in the ROTC programs. One does not have to be in the commissioning program to take a course.

The commissioning goal of the ROTC programs requires that students learn about, and show a willingness to commit themselves to military service. Indeed, students seeking commissions are in fact enlisted in one of the armed services during their last two academic years. Failure of a student to accept an offered commission can legally result in ordering that student to active duty in the enlisted ranks.

#### Rationale for Exclusion Based on Sexual Preference

The Department of Defense presently excludes from military service individuals who have engaged in homosexual acts; persons who desire homosexual activity; and persons who identify themselves as homosexual, independent of whether they have had homosexual experiences. The stated rationale for this policy is that such individuals "would seriously impair discipline, good order, morale and security."

The Committee could find no studies or data to support the claims that homosexuality interferes with the military mission. We were unable to find studies or data claiming that the concerns raised above had in fact materialized, despite acknowledgement that lesbians and gays have served in the military in large numbers for many years. The only effort to identify a rational basis for this policy was the "Crittenden Report," prepared by the Navy in 1957.<sup>5</sup> This extensive report concluded that there was no data to support the claim that lesbians or gays cannot effectively serve in the military, and that there was considerable information indicating that homosexuality itself did not constitute a security risk.

As recently as 1983 an Air Force regulation (AFR 160-43) included homosexuality under "Psychiatric Disorders" and incorrectly stated it was listed in DSM-III as a psychiatric disorder. This also suggests that the current policy may be based on ignorance and mythology.

In contrast, the Committee noted that information is available which demonstrates or suggests heterosexual proclivities are associated with security risks.<sup>6</sup>

There is insufficient data to judge whether heterosexual or homosexual tendencies are more likely to be associated with these dangers, but in the absence of such evidence no argument was identified to support the claim that homosexual orientation is more likely to be dangerous to the military mission.

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5. In 1956 the Secretary of the Navy appointed a special board to investigate homosexuality and its relationship to military service. Captain S. H. Crittenden, U.S.N., served as chair. The 656-page document resulting from this study is entitled "Report of the Board Appointed to Prepare and Submit Recommendations to the Secretary of the Navy for the Revision of Policies, Procedures and Directives Dealing with Homosexuals; 21 December 1956 - 15 March 1957." It is also called the Crittenden report.

6. An example is the conduct recently reported by the news media of a marine guard's violation of rules in the United States embassy in Moscow.

## AIDS

The Committee also considered claims that the AIDS epidemic constitutes a rational basis for excluding gays or bisexual men, since they are a high risk group for AIDS. Apart from the question of whether an asymptomatic individual with the AIDS virus (now known as HIV infection) interferes with the military mission, such individuals are presently excluded by routine screening at the time of entering active duty. This is a more efficient and effective method of excluding applicants with HIV infection, since it does not rely on self-disclosure, and also excludes infected individuals who are not gay.

## Land Grant University Obligation

Land grant universities are required to offer instruction in military tactics. Land grant funds are appropriated to colleges "where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and mechanical arts." 7 U.S.C. 304.

The Madison campus has historically fulfilled the military tactics requirement through the ROTC programs. ROTC may not be the only way for a university to meet the military requirement.

There is at least some legal basis under federal regulations for cutting off all university research funds should the ROTC programs be banned, see Public Law 92-436, 606(a) and the implementing procedures of 32 C.F.R. part. 216, and a similar provision in the National Aeronautics and Space Administration Act of 1969, P.L. 90-373 1.

In an undated memorandum to Representative Robert W. Kastenmeier on Congressional Research Service, The Library of Congress letterhead, it was reported by Matthew Weeden, Foreign Affairs Analyst, that "According to the Defense Department's Office of Education Policy and the Director of Legislation and Legal Policy, there has never been any legislation or official policy covering schools with defense contracts that have dropped their ROTC programs."

## Constitutionality and Legal Status

The committee's charge deals with discrimination based on sexual orientation in the Army, Navy and Air Force ROTC. As part of its study of the issue, the committee investigated the legal aspects of this issue and found several court cases related to the broad issue of homosexuality and the military.

Plainly, state laws cannot displace federal rules relating to eligibility to enlist or to seek a commission. This is because of the supremacy of federal law declared in the Constitution, see Article VI, cl.2. In United States v. City of Philadelphia, 798 F.2d 81 (3d Cir. 1986) the Court held that the Philadelphia Commission on Human Rights had no authority to enforce a city ordinance forbidding sexual orientation discrimination by barring a military recruiter from Temple University. The principle of federal supremacy is well established in practice. The fundamental point is that the state may not regulate the activities of the federal government.

There have been several cases in which regulations restricting sexual behavior of members of the Armed Services have been challenged. The cases of Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984); and Matlovich v. Secretary of the Air Force 591 F.2d 852, 859 (D.C. Cir. 1987) belong to this category. In every case, the courts have upheld the right of the Armed Services to have regulations regarding sexual activity of their personnel. However, the question of discrimination based on sexual orientation does not deal with rules regulating sexual conduct but rather prohibiting enlistment or retention of service members because of stated or inferred attraction to a particular sex. Therefore it can be argued that these cases do not directly address the issue studied by the committee.

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There have been two challenges to the portions of the regulations mandating discrimination based on sexual orientation in the military. In one of these cases, Matthews v. Marsh, 755 F.2d 182 (1st Cir. 1985) a ROTC cadet in Maine who was discharged from her Army ROTC unit for acknowledging that she is lesbian challenged her discharge. The US District Court of Maine ruled that the Army's exclusion of persons from its ranks because of statements indicating gay or lesbian sexual orientation is unconstitutional. The Army appealed this decision to the First Circuit Court of Appeals. Subsequently, statements by the former cadet indicated that she had participated in homosexual activity. This, in the opinion of the judges, changed the substance of the case and the case was neither overturned nor affirmed.

A similar case yielded a more conclusive ruling. In benShalom v. Secretary of the Army, 489 F.Supp 964 (E.D. Wis. 1980) the US District Court of the Eastern District of Wisconsin ruled that "the army regulation, which permits discharge of any soldier who evidences homosexual tendencies, desire or interest, but is without overt homosexual acts, violated First Amendment and constitutional right to privacy." The decision further includes a Writ of Mandamus, ordering that "the Department of the Army shall reinstate the petitioner as a member of the Army reserves with all duties, responsibilities and privileges earned by her prior to her discharge." The Army has appealed this ruling to an appeals court in Washington, D.C., as well as the Seventh District Court of Appeals. The Army has so far been unsuccessful in its attempts to have the ruling overturned.

In the case of Bowers v. Hardwick 106 S.Ct. 2841 (1986) the U.S. Supreme Court upheld the constitutionality of a Georgia anti-sodomy statute making homosexual conduct a crime. The relevance of this to the military cases is unclear for several reasons: (1) it addressed conduct, not sexual orientation; (2) it was based in part on the right of states to make such laws, and therefore might support the Wisconsin statute prohibiting discrimination; (3) it did not explicitly address the armed services and their particular requirements.

Wisconsin Assembly Bill 70, signed into law in 1982, amended Wisconsin's nondiscrimination laws to include sexual orientation as a basis for which discrimination is prohibited. This includes prohibiting the state (or its agencies, such as the University) from dealing with contractors who discriminate in any of the illegal ways. Former Attorney General Bronson LaFollette issued an advisory opinion in 1983, stating that he felt that the Legislature did not intend to include the federal government as a "contractor" within the meaning of the nondiscrimination law. He also pointed out that the Wisconsin Supreme Court has repeatedly held that the state and federal governments are excluded from coverage of a statute of general applicability, unless they are included by the express language of the statute.

Several legislators have challenged LaFollette's opinion regarding their intent when they passed AB 70. When the issue of ROTC anti-gay discrimination was being debated at the University of Wisconsin-Milwaukee, ten legislators sent a letter to the faculty stating that their intention was "to eliminate [anti-gay] discrimination wherever possible," and urging them to uphold the Faculty Senate's position.<sup>7</sup>

Another challenge to LaFollette's opinion is that there is express language in the statute to include the federal government, specifically a part of the U.S. military. The law explicitly includes the Wisconsin National Guard in its language which put into question LaFollette's claims about the intentions of the ten legislators. But at this time, in the absence of court action, the LaFollette opinion has the force of law. Therefore, so does his assertion that Wisconsin law is inapplicable to ROTC, and that the University can contract with the federal government with the latter not being considered a contractor.

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7. In considering discrimination policy at the UW-Milwaukee, the Faculty Senate voted 30-7 to enforce the UW-Milwaukee nondiscrimination policies by termination of the ROTC Contract effective July 1, 1988. The decision to terminate was later reversed by action of the full faculty 157 to 111 on September 19, 1985. The reversal resolution also recommended that "the Chancellor seek to resolve the issue at a higher level." UW-Milwaukee Faculty Document 1442, Final Report of the ROTC Task Force, March 21, 1985, and Faculty Document 1470, Appeal of Faculty Senate Approval of Faculty Document No. 1442, September 19, 1985.

Regardless of the validity of Bronson LaFollette's opinion, however, the Faculty Senate of the University of Wisconsin-Madison has affirmed that although "the laws of the State of Wisconsin do not affect the federal government or its agencies, the University remain at liberty to promulgate its own rules and regulations apart from the laws of Wisconsin" (Fac. Doc. 542). This liberty, of course, is restricted in that the University's actions cannot go against the laws of Wisconsin or the United States.

#### Benefit/Cost

The decision rests with the Regents of the University of Wisconsin-Madison, the administration, and the faculty as to whether the University nondiscrimination rules should be enforced. To make this decision, it is necessary to have background on the benefits of the programs and to assess the costs of ignoring the discrimination.

At the UW-Madison campus, in the 1985-86 academic year, 355 students participated in the ROTC programs during the first semester and 297 during the second. The amount of financial assistance to these students was \$379,881 for tuition, \$208,900 for subsistence, and \$39,028 for books. Only the tuition money goes into the General Public Revenue. The total General Public Revenue spent on maintenance of the ROTC programs was \$121,059. This does not take into account the free rent allotted to ROTC units, which total 25,986 square feet.

Since \$121,059 of the \$379,881 pays for the ROTC programs, this leaves \$258,822 to cover costs of other classes ROTC students take toward the completion of their degree and all the services funded by either General Program Revenues or segregated fees such as the libraries, student unions, recreational facilities, etc. It is unclear whether the funds paid by the federal government cover the entire cost of providing an education for these ROTC students or whether in fact the university is subsidizing their education. In light of this, the major benefits of the ROTC program predominantly accrue to the students and faculty involved in the program, not to the University itself nor to other students at the University.

In addition to ROTC program student grants, there are other benefits to society of the ROTC program. The benefit of ROTC on campus was highlighted by a recommendation of an earlier Ad Hoc Committee on ROTC (Faculty Document 38) that stated:

Since it is in the interest of society as a whole to have broadly-educated and well-trained officers in the military services, and since the University as a land-grant institution is obligated to provide instruction in military science and tactics, the University of Wisconsin should have high quality programs of officer education available on the Madison campus to all interested students.

An argument supporting the recommendation also noted: It is important in order to maintain political democracy in this country that the military be subordinate to civilian authority and under the control of the President and the Congress. This situation is best preserved if military officers are not a social caste apart from society, but feel themselves to be citizens like everyone else. Civilian orientation of officers is encouraged by having them attend schools where there is a wide diversity of ideas among students and faculty.

However, the criteria for selection of those eligible to benefit from ROTC programs has been determined to be flawed, by actions of the governing bodies of both the students (Wisconsin Student Association) and the faculty (Faculty Senate) of this university.<sup>8</sup>

If the existence of the ROTC programs on this campus is to be fully justified, discrimination on the basis of sexual preference must also be justified or accepted in the circumstances.

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8. Wisconsin Student Association adopted in Senate Bill 81, March 3, 1987. The Faculty Senate of The University of Wisconsin-Madison adopted the following resolution on May 7, 1979, "It is the sense of the Faculty Senate that our policies on nondiscrimination at UW-Madison should include sexual preference as the basis on which discrimination is prohibited."

Upon full examination of the situation, the committee finds that ROTC-related classes and the commissioning process which leads to the advanced stage in the ROTC program are integral to each other. It rejects the claim that since gay and lesbian students can take ROTC classes, discrimination in other aspects of the program can be overlooked. The sequence of ROTC classes, along with commissioning, is one process leading to one goal. The purpose of these classes is to lead students into the later stages of the program, in which gay and lesbian students cannot participate. Also showing that the classes and commissioning are integral to each other is the fact that in the 1986-87 academic year, only a small number of non-ROTC students took classes in the ROTC-related departments.

#### Committee Agreement

Areas in which there was agreement in the Ad Hoc Committee are:

1. The University of Wisconsin-Madison is a land-grant institution and thus is required to offer instruction in military tactics. The University of Wisconsin-Madison historically has fulfilled this obligation through ROTC programs. It is clear that ROTC programs fulfill the obligation; it is not clear what course or courses would fulfill the obligation if ROTC programs were not offered.
2. The Armed Forces of the United States do not permit the enlistment or continuance in service of persons who engage in homosexual conduct or demonstrate a propensity to engage in homosexual conduct.
3. The Committee was unable to find any evidence or convincing argument, by military officials or elsewhere, that exclusion based on sexual preference is essential or important to the military mission.
4. Wisconsin Statutes (Section 16.765) and University Regulations prohibit discrimination on the basis of sexual orientation.
5. As a matter of law, Federal law takes precedence over State law when the two are in conflict.
6. The UW-Madison does not prohibit lesbians and gays from enrolling in ROTC courses, but lesbians and gays cannot attain cadet status and cannot be commissioned as officers unless they deny or remain silent concerning their sexual preferences.

#### **Conclusions and Recommendations**

##### Conclusions

- (1) Like all Americans, UW-Madison students have a strong interest in privacy regarding sexual orientation. They also have an interest in equal access to educational, training and employment opportunities that a commission in ROTC offers.
- (2) The present policy of excluding individuals based on sexual preference forces all interested students to either forfeit their privacy, or forego the opportunities offered by ROTC. The end result is discrimination based on sexual preference.
- (3) The committee could find no studies or data to support the claim that homosexuality interferes with the military mission. Therefore, exclusion of lesbians and gays does not appear necessary to the military mission.
- (4) This discrimination is explicitly prohibited by UW-Madison policy and violates the spirit of Wisconsin law. Prohibition of homosexual conduct has been constitutionally protected by federal courts. Discrimination based on sexual orientation, however, has been successfully challenged.
- (5) The ROTC program at the University of Wisconsin-Madison serves important social purposes and promotes the interests of students, the University, the state and the country. These interests include civilian education of military officers, as well as the economic benefits from the support of valuable educational programs.

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(6) Because of the benefits of the ROTC program, it would be desirable to retain such programs at the University of Wisconsin-Madison, if this could be done without discrimination based on sexual preference.

Recommendations

(1) While exclusion based on sexual conduct appears to be a settled legal issue at present, exclusion based on sexual orientation or preference is not clearly protected by law. We therefore urge the Faculty Senate to affirm its policy of nondiscrimination based on sexual orientation. We urge an effort to renegotiate University contracts with the Army, Navy and Air Force ROTC to include mutual agreement that discrimination based on sexual orientation is not permitted. We also urge a challenge to the legal basis for exclusion based on sexual orientation in admission and/or participation in University of Wisconsin-Madison ROTC programs if it is determined that there is a reasonable chance to win the challenge.

(2) Because the exclusion violates fundamental notions of equal opportunity and privacy, as well as violating University of Wisconsin-Madison policy and the intent of state law, we urge the Faculty Senate to vigorously pursue, by political means, a change in the regulations regarding exclusion based on sexual orientation.

(3) Because the interests of privacy and equal opportunity are so fundamental to the values and traditions which the military is intended to protect, if legal and political challenges fail, the University of Wisconsin-Madison should discontinue its affiliation with the ROTC program.

Ad Hoc Committee Members

Allison Amon  
Gordon Baldwin  
Luke Ellenberg  
Norman Fost  
Fern Mims  
Richard Rossmiller  
Richard Villasenor  
James B. Bower, Chair

Committee Members For the Majority Report  
in Regard to University Nondiscrimination Policies

Allison Amon  
Luke Ellenberg  
Norman Fost  
Fern Mims  
Richard Villasenor

(COMMENTS AND DISSENTS FOLLOW)

## PART II: COMMENTS RECEIVED FROM PROFESSOR BALDWIN

I agree with the majority on the following points:

1. that we are a land-grant institution with an obligation to include military tactics in our courses of instruction;
2. that Department of Defense regulations preclude the enlistment of homosexuals;
3. that anyone academically eligible may enroll in ROTC courses, but that Department of Defense regulations forbid homosexuals from enlisting in the armed services, and hence they may not become cadets or midshipmen in the commissioning program.

In all other respects the majority is woolly, inaccurate and incomplete. We deserve better. My dissent, therefore, is strong.

The issue as framed by the majority is whether ROTC programs which exclude on the basis of homosexuality should be terminated if they fail to remove the bar. The majority fails to note that homosexual conduct is a federal crime (10 U.S.C. §925).

The majority also fails to recite the basic Defense Department regulations. The majority says that the Defense Department is discriminating exclusively on the basis of sexual preference or orientation. The regulation, however, is framed in terms of homosexuality. It states:

"Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the military services to maintain discipline, good order, and morale; to foster mutual trust and confidence among service members; to insure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the military services; to maintain the public acceptability of military service; and to prevent breaches of security."<sup>1</sup>

### TWO POLICIES ARE BEFORE US

Two university policies, both approved by the Madison faculty, and by the Regents at various times, bear upon us.

### THE UNIVERSITY SUPPORTS ROTC PROGRAMS

The first policy is the decision to harbor ROTC programs. By contract with the armed services we offer students opportunities to earn commissions. The contracts are reciprocal. The armed forces accept our academic standards, and the university accepts the standards for enlistment and commissioning in the armed forces. The majority seeks to change this despite a long and honored tradition.

Madison has had some sort of officer education program since 1861 when the Regents recommended the creation of a department of military science.<sup>2</sup> Madison is now one of about 36 campuses which have three ROTC programs, and we are, therefore, the envy of many others. The armed services are unlikely to place an ROTC unit at new schools unless an ROTC unit is

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1. 32 C.F.R. Part 41, App. A (Part 1, Sec. H(1)). This regulation also defines homosexual, homosexual acts, and enumerates other reasons for discharging, including for alcohol and drug abuse.

2. Curti & Carstenson, I The University of Wisconsin 115 (U.W. Press 1949).

removed from an existing place. The majority's recommendation to terminate our contracts unless the services do our bidding thus accommodates our competitors, and would deprive hundreds of our students with valuable opportunities.

The officer education programs value is greater than the majority recognizes. The total value of the salaries, support, and expenses paid by the national government for the ROTC programs and for their people on this campus comes to around \$2,000,000 per year. We get back about \$20 for every \$1 contributed.

#### ANTI-DISCRIMINATION POLICY

The second policy forbids the university from discriminating on the basis of sexual preferences. This is also found in Wisconsin law. The majority admits that Wisconsin law does not bind the national government.

#### THE TWO POLICIES ARE NOT IN CONFLICT

It is simple to reconcile the two policies. The university does not discriminate on the basis of sexual preference, nor do the armed forces. The armed forces do discriminate on the basis of homosexuality. The rules of the armed services focus upon conduct; the university rules focus on belief and disposition. The armed services standards are part of a large number of rules pertaining to enlistment and commissioning.

#### HOMOSEXUALS ENJOY THE OPPORTUNITIES THE UNIVERSITY OFFERS

Homosexuals may benefit from the ROTC program. They may take any course offered for which they are academically eligible. They simply may not enlist or be commissioned in the armed forces. The university should have no more control over commissioning standards than it does over standards for admission to practice law, or medicine or in any licensed profession.

The majority can not rely upon the laws of Wisconsin, even if they were construed to forbid discrimination against homosexual conduct. The Attorney General of Wisconsin concluded in an opinion issued April 5, 1983 that state discrimination laws were inapplicable to ROTC programs on the U.W. System campuses and therefore the programs were not in violation of Wis. Stat. §16.765(1) which forbids discrimination on the basis of sexual orientation. <sup>3</sup>

#### IF A CONFLICT EXISTS WHICH POLICY SHOULD PREVAIL?

Even assuming that the two policies conflict, the majority should explain why one policy should be favored over the other. Moral principles support both sides of an argument. Homosexual behavior is punishable in a lot of places, and claims of constitutional privacy were rejected last year by the Supreme Court.<sup>4</sup> However, the value or morality of one's sexual orientation is not relevant here. The only question is whether the state and campus policies against sexual orientation discrimination should apply at the expense of another policy favoring ROTC programs? The majority favors a policy which would discriminate against those seeking a commission in the armed forces.

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3. The Attorney General's opinion conforms to United States v. City of Philadelphia, 798 F.2d 81 (3d Cir. 1986). Here the Third Circuit Court of Appeals held that the Philadelphia Commission on Human Rights had no authority to enforce a city ordinance forbidding sexual orientation discrimination by barring a military recruiter from Temple University. The Attorney General's opinion also rests on a proposition of Wisconsin law that if the legislature wishes to hit the federal government it must do so explicitly. The subjective intent of particular legislators is irrelevant.

4. Bowers v. Hardwick, 106 S.Ct. 2841 (1986).

The majority accepts the fact that the armed services engage in gender discrimination in that females may not be commissioned in the combat arms, may not serve on major combat vessels and may not fly aircraft into combat. Why is the majority so distressed about a different kind of discrimination, but not as much about gender discrimination? The majority may conclude that some types of discrimination are agreeable but other types are not. If so, the majority should explain.

#### THE MAJORITY DOES NOT TRY TO RECONCILE THE POLICIES

It would be possible for the majority to reconcile the two policies, but the majority does not try. The majority could:

1. conclude that the university policies do not apply to standards set off campus by the national government where the university does not enforce those standards;
2. note that the Defense Department only focuses on homosexual conduct, and upon those likely to engage in forbidden homosexual conduct, and hence the sexual orientation policies of this campus are inapplicable;
3. only urge that the Congress change the law (10 U.S.C. §925) and that the armed services change their policies on the enlistment and commissioning of homosexuals; (the Regents recently so urged, but the Regents did not say they would terminate the ROTC programs if the laws weren't changed).
4. decide that if there is a policy conflict that neutral guides for preferring ROTC exist. I urge this conclusion for the following reasons.

#### ROTC STANDARDS FOCUS ON HOMOSEXUALS NOT SIMPLY ON SEXUAL ORIENTATION OR PREFERENCES

The majority focuses upon discrimination on the basis of "sexual preference," but there isn't a word in the regulations about that. The services exclude on the basis of predicted conduct! Their right to exclude is a much stronger right than the right to expel, and all the cases supporting armed services policies involve the discharge of homosexuals.

The legality of discharging armed forces members who engage in homosexual conduct has been sustained in all cases.<sup>5</sup> If discharge for homosexual behavior is allowed, it logically follows that the enlistment of those likely to engage in such behavior should similarly be forbidden.<sup>6</sup>

#### NO ONE IS EXCLUDED FROM ROTC BECAUSE OF AN ABSTRACT BELIEF IN HOMOSEXUALITY

We have no evidence that anyone has actually been excluded from enlisting in the armed forces simply because of a theoretical belief. The majority saw the Air Force application which simply asks: "Are you a homosexual or a bisexual?" This is not a question about belief! Further, the application asks: "Do you intend to engage in homosexual acts...?" The freedom of association argument advanced by some members of the majority is specious, because the question of belief is not in issue.<sup>7</sup>

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5. Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984).

6. The case of benShalom v. Secretary of the Army, 489 F. Supp. 976 (E.D. Wis. 1980) wherein Judge Evans forbade the discharge of an admitted lesbian, who alleges she did not engage in homosexual conduct, is obviously different because she alleges she was discharged for a belief. Moreover, the decision deals with a discharge and has nothing whatever to do with the standards of enlistment or commissioning. The case is also on appeal, and we know that the appellate process is time-consuming.

7. See Johnson v. Orr, 617 F. Supp. 170 (E.D. Calif. 1985) wherein a First Amendment defense to a discharge of a proclaimed lesbian was rejected.

## EXCLUDING ON THE BASIS OF PREDICTED BEHAVIOR IS LAWFUL

The majority cites judicial decisions validating armed forces exclusion of people for their sexual behavior,<sup>8</sup> and the majority correctly points out that Bowers v. Hardwick dealt with conduct not "orientation."<sup>9</sup> It is lawful to discriminate on that basis. Homosexuals are not a "suspect class"—there is no authority whatsoever to suggest that they are. Practicing homosexuality is not a fundamental right.<sup>10</sup>

The Defense Department regulations only discriminate on the basis of sexual behavior. They do not forbid enlistment of a person merely on the basis of an abstract "preference." The majority, without any authority whatsoever, disagrees. On page 2 the majority states:

"The broad scope of the [Dept. of Defense] directive has been interpreted as including anyone admitting to being lesbian or gay, associating with those known or suspected of being lesbian or gay, frequenting a gay/lesbian-identified establishment, or owning gay/lesbian literature." (emphasis supplied).

I don't know where the majority found this interpretation. If the regulations have "been interpreted" as the majority reports, it is indeed strange. Does anyone with any degree of authority or judgment make such a bizarre interpretation? The only authoritative interpretations we know about are in judicial decisions and in the regulations themselves. I'm unaware of anyone excluded from ROTC on the grounds the majority reports. The majority should supply evidence of an authoritative or reliable interpretation that supports their assertion, because the majority flatly contradicts the plain language of the armed forces regulations cited above. The majority appears to rely on rumors.

Discrimination on the basis of homosexual behavior is totally unlike gender discrimination and race discrimination. The latter are based on indelible and unchangeable qualities. A mere sexual preference may or may not be unchangeable, but homosexual behavior is just that, behavior which is penalized by federal law (see 10 U.S.C. §925).

## SOME RATIONALITY UNDERLIES THE ARMED FORCES POLICIES

The majority concludes that they could find no rational reasons for the Department of Defense policy that excludes homosexuals from entering the armed forces of the United States. The conclusion is flawed in two ways.

First, the majority is wrong in assuming that the Department of Defense has the burden of proof. They supply no basis for their conclusion other than an assertion that discrimination against homosexuals must be justified by strict standards. This is plainly wrong. The majority cites no authority for its premise, because there is none. No court has ever ruled that the government bears the burden of justifying an exclusion of homosexuals from enlistment or commissioning.<sup>11</sup> Homosexual conduct is a crime under federal military law (10 U.S.C. §925).

## THE ENLISTMENT RULES HAVE SUFFICIENT JUSTIFICATION

The majority errs in declining to see rationality in the armed services policies. This conclusion is also wrong for reasons that follow.

The majority in note 5 cites an obscure 30-year-old Navy report which was never approved by anyone in authority, but the majority does not address several possible reasons that would today justify exclusion of homosexuals from the armed services.

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8. Committee Report, p. 3.

9. Committee Report, p. 4.

10. See Bowers v. Hardwick, 106 S.Ct. 2841 (1986).

11. Dronenburg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984).

1. In the first place homosexual conduct does violate the laws of near half the states in the nation. It is a crime under federal law (see 10 U.S.C. §925). The Supreme Court last year held that those laws were constitutional, and did not violate the privacy interests of individuals, Bowers v. Hardwick, supra. Why is it irrational to exclude from the armed forces a group of people who will, because of their likely conduct, violate laws? It is surely rational to decide not to place people in a setting where their conduct will violate a law that is constitutional.<sup>12</sup>

2. Is it irrational for the armed services to conclude that military efficiency is best served if a minority with differing sexual practices are excluded from the services? The majority fails to recognize that members of the military often live in close and confined quarters—on ships, submarines, in crowded barracks, etc. We have sufficient difficulty coping with the majority with heterosexual preferences. It is hardly irrational to conclude that one more set of problems can be avoided by the exclusion.

3. Only a few state laws and policies explicitly protect homosexual behavior, whereas a large number of people in the nation, and a significant number of states have laws punishing homosexual behavior. It is surely rational for the Defense Department to conclude that the morale and discipline of the armed services are promoted by a uniform policy.

4. The military does exclude anyone with the critical AIDS virus antibodies, but it goes further. That homosexuals are now among the groups with a higher risk of exposure to AIDS is well-established. Since every member of the military is a potential blood donor (aboard ships at sea this is plainly true), is it irrational to conclude that those in a high risk group should be excluded? The majority fails to tell us why a high risk group should be recruited. The routine screening for AIDS antibodies is imperfect.

The majority did not look for even minimal rationality. The majority concludes without considering the laws forbidding homosexual conduct, nor did the majority give weight to the conclusions of the Department of Defense.

#### THE MAJORITY RECOMMENDS TERMINATION OF ROTC

The majority recommends that if the armed services fail to follow the majority views then ROTC should be terminated on this campus. This recommendation is irresponsible. It fails to note that Congress would have to repeal a law (10 U.S.C. §925). Moreover the majority recommends discrimination against hundreds of students seeking commission on this campus. The majority does not explain why its discrimination is fair, but the armed forces discrimination is unfair.

#### NEUTRAL GROUNDS FOR PREFERRING ROTC

A neutral guide to reconciling the two university policies is supplied by several national policies, embodied in law, which direct us to prefer the ROTC. The majority fails to discuss those policies. An observer might well conclude that the majority is deaf to the voice of reason.

The national policies are found in at least three places:

1. The Land Grant Act provides that:

[funds are appropriated to colleges] "where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and mechanical arts." 7 U.S.C. §304

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12. Convictions for sodomy have been sustained over constitutional objections, see Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir. 1981); United States v. Rogan, 19 M.J. 646 (AFCMR 1984).

The Madison campus has historically fulfilled that command through the ROTC programs. The majority blindly, and I fear self-righteously, simply says "we must have it our way, or no one will have an opportunity." The majority does not suggest alternative means of meeting our land-grant obligations.

2. The principle that ROTC is very important is underlined by the federal law that suggests termination of research projects at schools that bar military recruiters, which presumably would be the result if an ROTC program were terminated.<sup>13</sup> Doubtless the threat of termination is slight but I would like more solid authority than an undated inquiry by a member of Congress from a Pentagon office concerned with education. The majority's cavalier dismissal of these national guidelines borders on the irresponsible.

3. Congress has delegated to the Defense Department authority to make rules for enlistments and commissioning. The University does not challenge other physical and mental standards required for admission into the armed services.

#### MILITARY SERVICE DIFFERS FROM CIVILIAN SERVICE

In urging the application of state and campus standards to enlistment and commissioning, the majority fails to understand the differences between military and civilian service. ROTC programs seek to assist students in learning about those differences. Not everyone is fit for military service, and Congress and the courts decide to leave fitness decisions in the hands of the Department of Defense. Now comes a faculty majority which says "change or we'll toss you off campus."

The essence of military service is the subordination of the desires and interests of the individual to the needs of the service. That subordination of individual choice is the foundation of military discipline, and for civilian command of the American military. However, the majority insists on applying the same standards to the military that they would apply to any employer. This is just plain silly. The obligations of military service sharply differ from those of other employees. Courts emphasize this difference in holding that military personnel have different remedies for the mistakes of their superiors.<sup>14</sup>

Military service differs in that it requires a degree of discipline and self-sacrifice seldom demanded by other employers. The Supreme Court of the United States has repeatedly upheld military rules that would not be acceptable in other settings.<sup>15</sup>

It is hardly surprising, therefore, that military regulations, authorized by law as well as proven by tradition and custom, differ from the regulations imposed on civilian society. The military service demands a respect for duty and discipline without counterpart in civilian life. The fact is that membership in the armed forces exacts a cost—members give up some of the claims that would be honored in civilian life. One aspect of the education program on this campus helps prepare those students for that different life.

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13. Public Law 92-436, §606(a), 86 Stat. 740 and the implementing procedures of 32 C.F.R. part. 216, and a similar provision in the National Aeronautics and Space Administration Act of 1969, P.L. 90-373 §1.

14. Chappel v. Wallace, 462 U.S. 296 (1983) a soldier can not sue his superior for racial discrimination; United States v. Stanley, \_\_ U.S. \_\_, 55 U.S.L.W. 5100 (June 25, 1987) a soldier may not sue under the Tort Claims Act or under the Constitution for nonconsensual administration of LSD. Some sex discrimination in military service is allowed; see Rostker v. Goldberg, 453 U.S. 57 (1981).

15. Solorio v. United States, \_\_ U.S. \_\_, 55 U.S.L.W. 5038, (June 25, 1987) holding that military personnel can be tried by court martial for non-service connected offenses; Goldman v. Weinberger, \_\_ U.S. \_\_, 106 S.Ct. 1310 (1986) upholding a rule forbidding a rabbi from wearing his yarmulke on active military duty.

## ROTC IS VOLUNTARY

The majority recommendation would preclude our students from volunteering to seek a commission in a program offered on this campus. No one is today compelled to serve in the armed services; we are committed to a volunteer armed force. The ROTC programs are voluntary, but all ROTC courses are open to students who do not seek a commission.

The majority concludes that the current policy "forces" individuals either to "forfeit privacy, or forego the opportunities offered by ROTC." This is ridiculous in that no one is forced to do anything nor is anyone required to forfeit any "right." No "right" exists to engage in homosexual conduct, and there is no "right" to join the armed forces. The majority for reasons it fails to explain finds a right to join the armed services. The majority cites no authority for the proposition that anyone has a "right" to join the armed forces because no such authority exists.

## THE VALUES OF ROTC OUTWEIGH THE VALUE OF FORBIDDING ROTC ON CAMPUS

The majority has the burden of persuading us that the rather general anti-discrimination policies of the campus should prevail over the campus policies adopting ROTC programs. Even in the absence of the federal statutes noted above, the values of the program outweigh any privacy claims because no privacy is invaded.

The majority concludes that it would be better to forbid the ROTC on the Madison campus than to allow the present exclusionary policy to continue. The majority buttresses its claim with a vague statement that "the interests of privacy and equal opportunity are so fundamental to the values and tradition which the military is intended to protect"<sup>16</sup> that we should discontinue affiliation with ROTC. Where did this come from? Who tells the majority what is so fundamental and why? Clearly no privacy interests are implicated for the following reasons.

## PRIVACY INTERESTS ARE IN NO WAY INVADED

The majority talks about "privacy." The majority's underlying premise is that the military must follow and adopt in its internal rules all the values of civilian society. That this is patent nonsense is revealed by a large number of decisions upholding restraints on the military that would not be allowed in civilian life.<sup>17</sup>

Privacy is often sacrificed for other more important values. The majority appears to believe that privacy is the dominant value, but the majority fails to explain the basis of that belief. The majority ought to realize that there are many areas where privacy values are sacrificed, and that equal opportunity values are qualified by more important societal interests. It takes more than a vague invocation of a privacy plea to be persuasive.

The existence of privacy or equal opportunity "rights" is determined only after a balancing of individual and societal interests. That balance is struck after analysis, and not before it. The majority fails to tell us what it means by "privacy."

No protected privacy interests are infringed by the government when it asks: "Are you homosexual?" No one is forced to join the armed forces. The armed services seek information relevant to the ability of applicants to perform military, naval and air service. The majority appears to believe that everyone should have an equal opportunity to serve in the armed forces. This is patently ridiculous. The armed services are allowed by Congress and the courts to establish qualifications for enlistment or commissioning.<sup>18</sup>

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16. Committee Report, p. 7.

17. See notes 14 and 15 supra.

18. See Rostker v. Goldberg, 453 U.S. 57 (1981).

## WHAT IS PRIVACY?

Privacy is protected only because some rule prefers the interests of an individual over the claims of society.

Two types of privacy interests exist, but neither is implicated by the armed forces rules. The two are:

1) claims to be free from government intrusion. Thus we enjoy freedom from unreasonable searches and from compulsory self-incrimination. This freedom is not absolute—government can require you to file income tax returns and command disclosure of assets, etc. The armed forces regulations are not a governmental intrusion, because one volunteers for military service.

2) claims to make personal choices. Freedom to make personal choices is not absolute—i.e., government forbids near relatives from marrying, etc., requires a blood test and charges a marriage license fee, and imposes waiting periods between license and marriage, etc. Government may forbid you from living where you wish to live because of zoning laws, safety regulations, etc. Some personal choices, such as the right to marry a person of a different race are protected,<sup>19</sup> and to view pornography in the privacy of one's home.<sup>20</sup> The armed forces regulations do not trespass on any protected personal choice. One may think as one wishes, but homosexuals may not enlist or be commissioned in the armed forces. That prohibition does not invade any right to make a personal choice.

Even having a protected choice does not mean that government bears an obligation to foster that choice—i.e., free speech exists, but the government does not have the obligation of buying you a printing press, or transporting you to a public forum. A person may, in some jurisdictions, engage in homosexual behavior, but that does not imply a governmental duty to supply the opportunity. The armed services invade no rights, in property, or anything else, when they ask applicants whether or not they are homosexual. The question relates to potential job performance. Claims of sexual freedom in no way bars asking questions.<sup>21</sup>

## THE MAJORITY REPORT IS UNPRINCIPLED

I fail to see any principled basis for the majority recommendations for the following reasons.

1. An Act of Congress forbids homosexual behavior. The armed forces really have no choice but to forbid the enlistment or commissioning of homosexuals unless Congress repeals that law.

2. Some members of the majority evidently believe that a strong statement from them will, in due course, have some impact on the Congress and that the policies will change. Their recommendations are a bluff. It is foolish to bluff with a weak hand. The facts are that the armed services have many institutions seeking to sponsor ROTC programs. Wisconsin's bluff would be called and we will lose three valuable programs.

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19. Loving v. Va, 388 U.S. 1 (1966).

20. Stanley v. Georgia, 394 U.S. 557 (1969).

21. The Supreme Court has not supported the claim that rights of privacy protect sexual freedom generally; see denial of review of sodomy convictions, Lovisi v. Slayton, 363 Fed. Supp. 620 (E.D.Va. 1973); aff'd 539 F.2d 349 (4th Cir. 1976); cert. denied 429 U.S. 977 (1976); and a discharge of public employees for adultery, Hollenbaugh v. Carnegie Free Library, review denied, 439 U.S. 1052 (1979) (Marshall, J. dissenting).

3. Some of us in the Madison community are deeply suspicious that the underlying motivation of the majority exercise is a mask obscuring the anti-military posture shared by some parts of the Madison campus. The majority recommendations will be gleefully embraced by those who object to America's military and foreign policies.

4. That ROTC programs have great value in supplying the services with a civilian educated officer corps is stated by the majority, but that appears to be a shallow belief. The majority states that no matter how valuable the ROTC program is, it is not as valuable as a policy pronouncement against discrimination against homosexuals.

5. The majority advances its own ideology at the expense of those students who seek an opportunity to earn a commission.

Gordon B. Baldwin  
July 30, 1987

PART III: RESPONSE TO COMMENTS FROM PROFESSOR BALDWIN

Professor Baldwin's comments misrepresent several aspects of the Committee's process, conclusions, findings, and purpose. This is intended to clarify those issues.

Numbers in () refer to page and paragraph of the Committee's Report including comments.

1. The Baldwin comments focus on legal issues and falsely frame the Committee's purpose as primarily legalistic (8,6). The Committee's focus was broader, including consideration of ethical issues of privacy, equal access, and discrimination; the absence of convincing argument or evidence to justify the policies of homosexual exclusion; and the legal issues.

The Committee starts with the widely-shared belief that privacy and equal opportunity are fundamental American values. We start with the assumption that these values should be respected unless there is some compelling state interest in overruling them. The importance of these values to Wisconsin citizens is documented by a statute prohibiting discrimination based on sexual preference. A program which explicitly intrudes into the sexual privacy of students, and denies opportunities for reasons other than competence, does in our view, have a burden to justify itself. The Baldwin comments focus on the legal and political power of the military services to force universities to bend to this discrimination. The Committee was more concerned with the (ethical) justification for exerting this power, or any other convincing basis for exerting this power. We could find none in DOD policies.

We also note the questionable legal basis for exclusion on the basis of sexual orientation, as well as the absence of a coherent argument or evidence to justify the exclusion based on conduct.

2. The Baldwin comments falsely states the Committee "says the Defense Department is discriminating exclusively on the basis of sexual preference or orientation (8,7)." There is no such statement in the report. Acknowledgment that sexual conduct is an important part of the exclusion can be found in Conclusion #4 and Recommendation #1. Such acknowledgment by the Committee is even cited in the Baldwin comments (11,1).

3. The Baldwin comments falsely state that the armed forces do not discriminate on the basis of sexual preference, but only on the basis of sexual behavior (9,3) (10,4). The Committee found clear evidence of discrimination based on preference and orientation (2,6) (Ref. 4: Army Regulation 601-210).

4. The Baldwin comments falsely state that "The Majority accepts the fact that the armed services engage in gender discrimination.." The report does not accept or comment on gender discrimination, since it was not part of the charge of the Committee.

5. The Baldwin comments falsely accuse the Committee of failing to use "authoritative or reliable interpretation(s)" of military policy, and of "(relying) on rumors" (11,4) in contradicting his assertions that "The Defense Department regulations only discriminate on the basis of sexual behavior."

Among other sources, the Committee relied on Army Regulation 601-210, which was supplied to the Committee by Professor Baldwin, who received it from James L. Baker, Professor of Military Science, in response to a request from Professor Baldwin. This regulation states in listing "Disqualification" criteria for enlistment: "Homosexuality includes person who....is an admitted homosexual but as to whom no evidence exists that he or she has engaged in homosexual acts either before or during military service."

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6. The Baldwin comments rely on the spread of AIDS as a justification for the exclusion of homosexuals (12,4) claiming that the serological screening program is imperfect. He cites no evidence for this. In fact, present screening tests for HIV infection have a 99% sensitivity (REF). His comments imply, without evidence or argument, that a questionnaire survey will improve on this.

7. The Baldwin comments falsely accuse the Committee of not "considering the laws forbidding homosexual conduct." The Committee gave careful consideration to these laws, as reflected in our conclusions and recommendations. The Baldwin comments state that the Committee did not "give weight to the conclusions of the Department of Defense." In fact we gave considerable weight to the only study conducted by the military - the Crittenden Report - which concluded that there was no data to support the claim that lesbians or gays cannot effectively serve in the military, and that there was considerable information indicating that homosexuality itself did not constitute a security risk (2,7).

8. The Baldwin comments provide their own rationale for the military's exclusion policy (11,8-12,5) but nowhere defends or justifies the rationale used by the military (8,7) which the Committee considered carefully and found to be without logic or evidence. The military's "reasons" consist of a series of claims (e.g., "The presence of such members adversely affects..ability..to maintain discipline") without argument or evidence how or why sexual orientation or conduct would, in theory or fact, affect discipline. The Baldwin comments nowhere defend or justify these reasons, which were the ones provided to us by the Defense Department, but instead presents their own, which were not available to the Committee until after the Report was written and voted on.

9. The Baldwin comments falsely accuse the Committee of recommending discrimination (12,6). The Committee's central concern is equal opportunity - the opposite of discrimination - and specifically recommends ending discrimination in all three of its recommendations. We prefer that equal access be provided with retention of the ROTC program. The unattractive alternative of terminating the ROTC program is also based on the principle of equal treatment, the opposite of discrimination.

10. The Baldwin comments falsely accuse the Committee of failing to discuss the Land Grant Act (12,7). An entire section is devoted to consideration of this law (3,2-5) and it is acknowledged in the section on "Committee Agreement" (6,3).

11. The Baldwin comments falsely identify the Committee with the claim that there is "a right to join the armed forces" (14,2). The Committee makes no such claim. It only claims that University programs should not discriminate on the basis of sexual preference, or require students to disclose the personal and private information without argument or evidence that such discrimination and intrusion serves a rational purpose.

12. The Baldwin comments falsely identify the anti-discrimination policies as "rather general" (14,3). In fact, state law and campus regulations specifically prohibit discrimination on the basis of sexual preference (4,4; Committee Agreement #4).

13. The Baldwin comments ask for the source of the Committee's claim that privacy and equal opportunity are fundamental values (14,4). The sources include the people of the state of Wisconsin, who expressed themselves through their legislators, and the faculty of the University of Wisconsin-Madison, who expressed themselves through the Faculty Senate (May 7, 1979, reaffirmed Nov. 1, 1982).

14. The Baldwin comments state that the Committee holds that the military "must follow and adopt in its internal rules all the values of a civilian society (14,5)." That is not stated in the report, nor was it discussed, nor is it the view of the Committee.

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15. The Baldwin comments assign to the Committee the view that "everyone should have an equal opportunity to serve in the armed forces (14,8)." That is not stated in the report, nor was it proposed, nor is it the view of the Committee. The Committee's view, as stated, is that students should not be discriminated against on the basis of sexual orientation, until or unless there is some argument or evidence that such discrimination is important to the military mission.

16. The Baldwin comments impugn the motivation of the Committee (16,1) without evidence or documentation. There were no comments of prior anti-military postures at any time throughout the Committee's existence. The only comments related to this were frequent expressions, shared by Committee members, of the positive value of the ROTC program, and the importance of civilian education of military officers.

The characterization of the Committee's respect for the value of ROTC as "shallow" (16,2) misrepresents this positive attitude toward ROTC. The Committee saw this dilemma as an anguishing one, involving important competing values.

PART IV: CONCURRING AND DISSENTING REPORTS

RICHARD A. ROSSMILLER and JAMES B. BOWER concurring and supporting the REPORT OF THE AD HOC COMMITTEE....except dissenting from Recommendation (3).

Our dissent to Recommendation (3) is based on the intent of Recommendation (3) to discontinue affiliation with the ROTC program should all else fail. The benefits of the ROTC program to assure continuance of civilian influence in the military, to enable effectiveness of the program in meeting University of Wisconsin-Madison obligations, to provide the advantages of the program availability to University of Wisconsin-Madison students electing to participate, and to the national interest are substantial. The financial support for student collegiate education that is provided through the ROTC programs is actively sought by other colleges and universities who do not have such programs. There is no need to link the availability and use of the ROTC programs of the University of Wisconsin-Madison to federal law, policy, or practice of its agencies. The linkage would not be effective leverage, and in our opinion, is not necessary and would accomplish little if any positive consequence.

Our dissent to Recommendation (3) would be resolved by a restatement of the recommendation as follows:

(3) Because the interests of privacy and equal opportunity are so fundamental to the values and traditions which the military is intended to protect, if legal and political challenges fail initially, effort to eliminate the discrimination based on sexual orientation will continue. To facilitate continuance the University Committee should arrange for the receipt of an annual statistical summary of ROTC programs data for review effective for the school year starting with the fall semester 1987-1988. The summary will be transmitted to the Faculty Senate if data are considered significant to the issue of exclusion based on sexual orientation.

September 1, 1987

Richard A. Rossmiller  
James B. Bower

GORDON B. BALDWIN'S REPLY TO THE MAJORITY RESPONSE IN PART III

I do not take it lightly that the majority accuses me of misrepresentation in Part III. Accordingly I reply to each of Part III's numbered paragraphs.

1. Because the foundation for the majority's notions of ethics rests on Wisconsin's law forbidding discrimination on the basis of sexual orientation, it is fair to examine the basis for that law. The majority, moreover, evidently concludes that federal laws forbidding homosexual conduct are unethical, or immoral.

The majority confuses the issue. They admit that it is lawful to exclude people from the armed forces on the basis of homosexual conduct, but then say, without evidence, that the armed forces exclude on the basis of "sexual orientation." This is plainly not what the armed services do!

The Department of Defense regulations explicitly focus on conduct not mere opinion. The armed forces exclude and discharge people who engage in homosexual conduct, or are reasonably found likely to engage in unlawful conduct.

The majority's assumption that only a compelling interest justifies the armed forces exclusion of homosexuals is incorrect. They cite no authority whatsoever for their conclusion. Their point is patently false. A recent case sustains my argument, Padulla v. Webster, 822 F.2d 97, 44 F.E.R.C. 175 (C.A. D.C. 26 June 1987). The court sustains the authority of the F.B.I. to refuse to employ homosexuals.

The majority presents a shifting target. In their initial reply to me in September they said they rested their arguments on "moral" grounds. In Part III they rest on "ethical" grounds. I suppose there is no difference. Their initial draft concluded that the exclusion had no rational basis, but they retreat and say that they are not "convinced." Doubtless they are not convinced. My point is that they should be convinced.

Their moral or ethical argument is flawed because their only source is a reference to University rules and Wisconsin law. They argue morals or ethics but fail to identify the foundation of their morality or their ethics, other than upon Wisconsin law. One can argue that homosexuality is immoral or unethical, citing Biblical text, or argue that it is moral.

I do not adopt a moral/ethical posture because a federal law binds the ROTC programs, and federal law will have to be changed if the armed forces are to change. The majority takes the position that the federal law is unethical. This is a serious accusation and requires more reasoning than pious appeals to privacy. Privacy interests are in no way involved in this matter.

The majority "notes the questionable legal basis for exclusion on the basis of sexual orientation." The majority does not cite any basis for its doubt. The majority's concern is irrelevant, however. The fact of the matter is that the exclusion is on the basis of homosexual conduct, or on the likelihood of homosexual conduct.

2. Paragraph 2 of Part III is incoherent. The majority accuses the Defense Department of improperly excluding on the basis of sexual orientation. The armed forces do not exclude on that basis. But the armed forces do exclude on the basis of reasonably predictable conduct. The majority does not explain why they conclude such an exclusion is immoral or unethical.

3. The Defense Department regulations define homosexual, homosexual acts, and enumerate other reasons for discharging or not enlisting people (or alcohol and drug abuse as well). Each service has implementing regulations which must be compatible with the D.O.D. rules. The majority implies that the Army Regulations conflict with the D.O.D. rules. The majority makes a legal argument again. If the Army regulations conflict with the Department of Defense regulations, then the Army regulations are illegal. It is easy, however, to show they are compatible in that the regulations are directed at homosexual conduct or predicted homosexual

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conduct. They are designed to hit the applicant who says "I'm homosexual but you can't prove it." It is surely appropriate not to enlist a person who says "I am homosexual." There is no rule here that a confession has to be buttressed by further evidence. The majority's interpretation of the Army regulations is bizarre!

4. The majority has no understanding whatsoever of the criteria for entering the armed services. Federal laws allow some gender discrimination, just as federal laws operate to forbid enlistment or commissioning of homosexuals. The University of Wisconsin has accepted armed forces programs on this campus since 1861 without objecting to the standards of enlistment or commissioning. I suggest that this fact suggests acceptance of lawful discrimination, including gender discrimination (by law females may not be given commissions in the combat arms, or serve on combatant vessels).

A majority of the committee at our initial meeting appeared to me to have its minds made up. "ROTC must accept homosexual or go" was the unexpressed motto. Student Villasenor, a vocal member of the majority, is quoted in the daily Cardinal as saying "we don't need a huge military program" (Sept. 10, 1987, p. 4, col. 3). This remark was made in connection with his advocacy that ROTC be thrown off campus unless they accept his vision. Another student member expressed similar misgivings about the value of ROTC in a recent meeting.

5. The majority continues to rely on the bare statement it makes on page two of Part I that "association with" homosexuals is grounds for exclusion. I repeat what I said on page 15 of my draft comments, that there is no authoritative evidence of this misstatement. It is clear, of course, that "an admitted homosexual" will not be permitted to enlist or be commissioned.

6. The military does exclude anyone with the critical AIDS virus antibodies, but it goes further. That homosexuals are now among the groups with a higher risk of exposure to AIDS is well-established. Since every member of the military is a potential blood donor (aboard ships at sea this is plainly true), is it irrational to conclude that those in a high risk group should be excluded? The majority fails to tell us why a high risk group should be recruited.<sup>1</sup> The routine screening for AIDS antibodies is imperfect.<sup>2</sup>

7. The majority does not say why the armed forces should enlist people whose conduct will be illegal in the states in which a majority of the armed forces are stationed, i.e., the District of Columbia, Virginia, North Carolina, Texas, South Carolina, Mississippi, Georgia, Florida, Arizona, etc. In saying that the laws of these, and other, states are unethical, the majority takes upon itself a heavy burden which they do not satisfy. The obscure Crittenden Report of 1957 was not approved by anybody.

8. The majority assumes that others have the burden of refuting their pronouncements. The committee appeared to be deaf to the voice of reason.

9. The majority takes the position that it is not discrimination to forbid our students an opportunity to earn commissions. We have no evidence that any homosexual has ever sought to obtain a commission through ROTC, but the majority recommends terminating ROTC if they fail to change the law and policies. Surely this is discrimination against those who seek the opportunity.

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1. The majority (Par. 6 of its reply) asserts that I am only relying on the drawbacks of a serological screening program. I am not. Homosexuals, we are told, are in a high risk health group. The armed forces simply exclude people in this high risk group as they may exclude otherwise healthy people with high blood pressure, asthma, etc.

2. Even if the tests are 99% perfect they do not, as I understand it, discern very recent exposures. Homosexuals are in a high risk group, as I think the majority will admit.

10. I accuse the majority of not giving weight to the policies favoring ROTC embodied in the Land Grant Act and Public Law 92-436. The majority persistently discounts the significance of laws against homosexuality and of laws promoting ROTC values. The majority, moreover, does not suggest alternative means of meeting our legal obligations. Student Villasenor in a Daily Cardinal article (Daily Cardinal, Sept. 10, 1987, p. 4, col. 3) suggests that History 396 qualifies under the Land Grant Act. This is surely news to Professor Coffman!

11. The implication of the majority report is that some "rights" are invaded, and that those rights are violated because the armed forces exclude homosexuals. Homosexuals they say have a "right" to join.

12. The Wisconsin and university policies are generalizations. They aren't self-defining as the majority admits when it concedes that the generalizations don't apply to the national government. Even under Wisconsin law a discrimination on the basis of an otherwise forbidden trait might, in some circumstances, be lawful and appropriate. Discrimination based on the needs of employment might, for example, be allowed even in Wisconsin.

13. Privacy and equal opportunity are values sometimes, but not always. Whether they are values depends upon the context and situation. Privacy, for example, is protected when on balance the interests of society are subordinate to the interests of individuals. In our setting the value of ROTC programs is reflected in acts of Congress. The majority takes exception to those values, and prefers its own notions.

14. The majority wants the military to follow the particular values that it holds.

15. The armed forces do not discriminate merely on the basis of "sexual orientation." They do discriminate on the basis of "homosexuality." The majority, moreover, does not give any weight whatsoever to the rationale for discrimination based on homosexuality that I outline in my dissent.

16. I do impugn the motivation of the majority. The majority includes three students selected by W.S.A. Each expressed support for the cause they espouse. Two faculty members of the committee appeared to have their minds made up from the beginning. I am accused in the committee minutes of November 13, 1987 of seeking to "undermine the Committee's work." I seek to show that there is no valid foundation for the majority's conclusion. If this be an attempt to "undermine" I hope it is successful.

The majority asserts (see Par. 165 of its reply) that the Committee had a "positive attitude" toward ROTC. I missed some meetings and it may be that I failed to hear those sentiments. Nothing in the contributions of the three student members suggested such an attitude. I rely upon the divergence between what the majority did and what it said. They say that their values are so important that ROTC should be terminated if the armed forces do not cease to exclude on the basis of homosexuality.

November 17, 1987

**SUBSTITUTE RESOLUTION TO THE RECOMMENDATIONS  
CONTAINED IN FACULTY DOCUMENT 732  
To Be Offered By The University Committee  
February 1, 1988**

1. In conformance with existing University policies on non-discrimination, we reaffirm the right of access to classes in Military Science, Naval Science, and Air Force Aerospace Studies on the part of any academically qualified student and will vigorously enforce Wisconsin law to that effect.
2. The University of Wisconsin-Madison should continue to participate in the ROTC programs through which training can lead to a Commission in the Armed Services.
3. The statutory and constitutional issues raised by the exclusion of homosexual men and women from the military should be addressed by the Regents, the Congress and the courts.

**Background for the Resolution**

The University Committee has read the reports on the status of homosexuals in ROTC and has discussed the reports with individuals from the ad hoc committee. We recognize that the issues involve a weighing of deeply held values. Our proposed resolutions express our respect for both sets of values and suggest the only practical alternative before us. In reaching this position, we found the following factors to be relevant:

1. We remain satisfied that there is no discrimination in the ability of students to enroll in and receive credit for courses taught by the three military branches here on this campus.
2. We feel that ROTC has played and will continue to play a useful role in keeping the military a part of society and that Wisconsin students have much to contribute to the military.
3. While we vigorously defend the right of individual faculty, staff and students to take any position they wish on any social or moral issue, we do not think it is wise for the University to take such positions, even on issues supported by a majority, unless the issue directly inhibits the ability of the University to fulfill its mission. Where opinion is divided, as it appears to be on this issue, the University should not be torn by a request to choose one side over another.
4. We recognize that classes in the military sciences are the University's responsibility while ROTC and its Commissioning process are federal functions. We find a sharp difference between Wisconsin and Federal laws regarding homosexuality. Because of Wisconsin's statutes, our elected officials have a particular responsibility to urge an examination of federal laws and regulations in this area.

# OPINION

## Gay rights

### ROTC rules flout justice

Will the University affirm equal opportunity, or will it buckle under to military might?

State law and University regulations prohibit discrimination on the basis of sexual orientation. Thus people of gay and lesbian sexual orientation have the right to participate in all programs under state and University auspices, on an equal basis with those of heterosexual orientation.

But out gays and lesbians are prohibited from receiving Reserve Officers' Training Corps scholarships, attaining ROTC cadet status and obtaining officer commissions, the latter of which precludes their serving as instructors in ROTC units.

Should ROTC continue to enjoy the privilege of operating under those conditions on campus? Absolutely not.

An ad hoc committee was set up to examine the issue. Last December, after extensive research, the committee's majority found that ROTC's "policy of excluding individuals based on sexual preference forces all interested students to either forfeit their privacy, or forego the opportunities offered by ROTC."

Consequently, the majority has called on the University to attempt renegotiation of its contracts with ROTC in order to prohibit such discrimination or, if legal and political challenges fail, to disaffiliate from the ROTC program altogether. Its conclusion, based on logical and lucid analysis, merits strong affirmation.

#### TODAY'S EDITORIAL

##### The Staff Opinion

Gordon Baldwin, Law School professor and committee member, has challenged the majority position. "The only question," he admits, "is whether the state and campus policies against sexual orientation discrimination should apply at the expense of another policy favoring ROTC programs." And he favors ROTC. His conclusions should be called into question.

Baldwin claims that the military discriminates only on the basis of sexual conduct, not of sexual orientation. But, as he acknowledges, the military does discriminate on the basis of "predicted conduct." "Predicted conduct" is meaningfully determined solely on the basis of identification of gay or lesbian tendencies or desires, that is, sexual orientation. Thus "predicted conduct" and sexual orientation are indistinguishable.

He further argues that "privacy interests are in no way invaded," although potential ROTC applicants are asked to disclose whether they "are homosexual or bisexual," and whether they "intend to engage in homosexual acts." Given the historic persecution of those who identify themselves as gay or lesbian, the infringement of privacy contains a potentially grave threat. But Baldwin's emphasis on the criminality of gay and lesbian sexual activity has blurred his capacity to understand that persons who are inclined toward gay or lesbian sexuality have rights commensurate with those of the rest of the population.

Baldwin's faulty analysis concludes with outright rejection of the validity of the committee majority's objection to ROTC discrimination on the basis of sexual orientation. He charges that the majority's position "is a mask obscuring the anti-military posture shared by some parts of the Madison campus..." and that its recommendations "will be gleefully embraced by those who object to America's military and foreign policies."

There are many among us who would not be disheartened by the removal of ROTC from our campus. But the question of discrimination is legitimate, and deadly serious. Baldwin's failure to acknowledge that legitimacy raises questions about his own agenda. When Capt. D.M. Kletter wrote a letter to Vice President of Academic Affairs Eugene Trani last fall, which included the ROTC committee's efforts in a list of lamentable "detractors" to ROTC recruitment, he sent Baldwin a copy. To what extent has Baldwin colluded with the military in formulating his position in favor of ROTC's policies and presence?

Baldwin's insistence on the "value" of ROTC has led him to conclude that termination of the program "accommodates our competitors, and would deprive hundreds of our students with valuable opportunities." We have heard these arguments before. Historically, government contractors who have violated contract provisions for equal employment opportunity have argued that pull-out of contracts would strengthen their competitors and result in loss of workers' jobs.

It is true that these cases have not been resolved by removal of government contracts. Nor, however, have they been resolved by preferring contract violation at the expense of equal opportunity. Instead, resolution has been achieved through restructuring of contractors' employment policies, with the result that contractors are brought into compliance with the equal employment opportunity obligation.

So too, the University, if it is committed to its own equal opportunity policies, should bring ROTC into compliance with them. If ROTC refuses, the University administration should not hesitate to terminate its contract.



Wisconsin Legislature  
Assembly Chamber

P.O. Box 8952  
Madison, WI 53708

October 15, 1987

The Faculty Senate  
Room 134 Bascom Hall  
University of Wisconsin  
Madison, WI 53706

Dear Members of the UW-Madison Faculty Senate:

This semester you will be addressing an issue of basic human rights: respect for an individual's right to privacy and right to be free from discrimination.

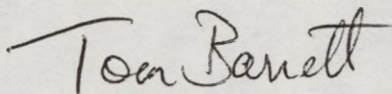
It is our belief that any form of discrimination that is based on qualities that are irrelevant to a person's ability to perform a job, such as race, sex, sexual orientation or religion, is clearly wrong. Society's interests are best served when its members are allowed to live their lives free from unjust recriminations. Everyone should be allowed, indeed, encouraged to work to achieve his or her full potential.

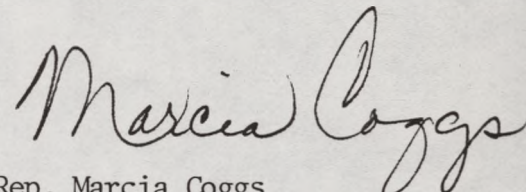
Only a few decades ago, many of our citizens were discriminated against because of race, sex or religion. In the military, for example, Black soldiers were segregated from white soldiers and were not allowed to become officers. The justification that was used was that the "negative attitudes" of many whites toward Blacks would cause morale problems. Now the same reasoning is used to exclude people based on sexual orientation. We must have the courage to stand up against all forms of discrimination and prejudice.

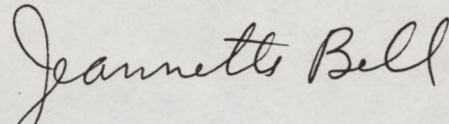
We understand that if the ROTC program were ultimately terminated on the UW-Madison campus, some truly needy students will be adversely affected. But we feel that allowing a program to continue because some individuals gain while others are denied assistance and unjustly discriminated against is wrong. We wonder if the Faculty Senate would stand for a scholarship program reserved only for whites just because those white students need the assistance. Of course, we hope and believe that the final step of terminating the University's contract with ROTC will not be necessary and that the ROTC programs will end their discrimination.

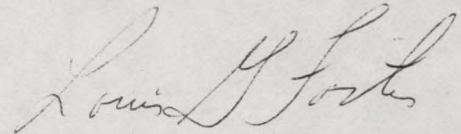
As Wisconsin State Legislators, it is our intent to work to eliminate unfair discrimination wherever possible. We feel that the Board of Regents and the majority of the UW-Madison Faculty Senate's Ad Hoc Committee on the ROTC issue have taken positive steps toward a fair solution to this problem.

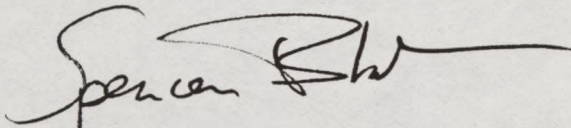
Sincerely,

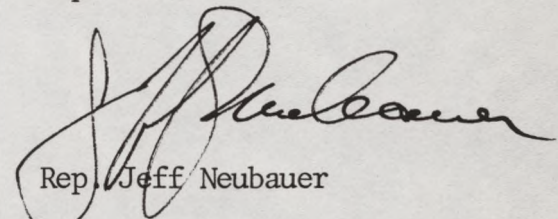
  
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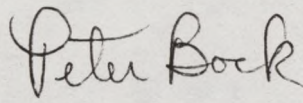
  
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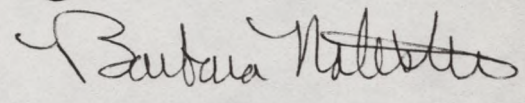
  
Rep. Jeannette Bell

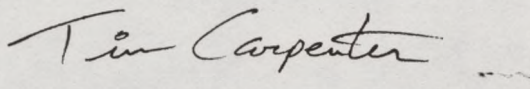
  
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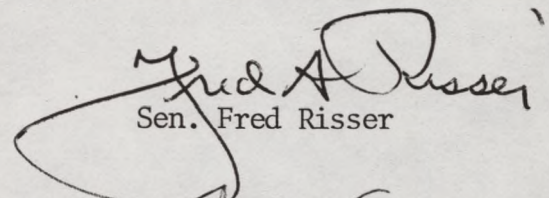
  
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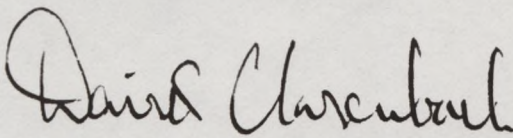
  
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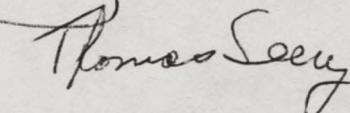
  
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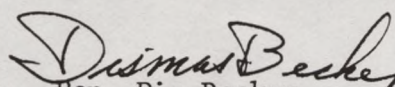
  
Rep. Barb Notestein

  
Rep. Tim Carpenter

  
Sen. Fred Risser

  
Rep. David Clarenbach

  
Rep. Thomas Seery

  
Rep. Dis Becker

for Monday

## ROTC AND UNIVERSITY NON-DISCRIMINATION POLICY

The University of Wisconsin-Madison has voluntary contracts with the Army, Navy and Air Force regarding presence on the campus of three ROTC units. These ROTC units are provided University facilities and supplies in exchange for instruction in military tactics. The ROTC units operate through three University departments, the department of Military Science, the department of Naval Science, and the department of Air Force Aerospace Studies.

Since instructors in these three departments are from the Armed Forces, lesbian and gay people are prohibited from instructor positions in three University departments. In addition, gay and lesbian students are prohibited from every phase of the ROTC program except classes. They are prohibited from wearing a uniform, receiving military-sponsored financial aid, and participating in marching and military protocol courses. The Army ROTC requires all students to fill out Cadet Command form 126 before they begin the program. One of the questions reads: "Have you ever engaged in, desired or intended to engage in bodily contact with a person of the same sex for the purpose of sexual satisfaction?" Similarly, the Air Force ROTC Form 20 requires students to answer: "Are you a homosexual or a bisexual?" and "Do you intend to engage in homosexual acts?"

These facts have resulted in the current policy conflict between the ROTC program on campus and the University of Wisconsin-Madison's non-discrimination policy, which includes non-discrimination based on sexual orientation.

### What is meant by 'discrimination based on sexual orientation', and how it is different than prohibiting sexual conduct

Federal law prohibits several types of sexual conduct for anyone who is a member of the Armed Forces. Article 125 of the Uniform Code of Military Justice makes 'sodomy' a felony for these people. 'Sodomy' refers to any sexual activity except heterosexual sex in the missionary position. Homosexual activity is, of course, included in this definition. This has confused some people into thinking that the Armed Forces merely excludes people based on their sexual activity. They do enforce the rules on sexual activity, but they also go beyond this and discriminate based on sexual orientation.

Discrimination based on sexual orientation is an established phrase used by hundreds of universities and municipalities. Although Wisconsin state law is not applicable, it is useful to examine the meaning of the phrase under Wisconsin statutes. According to Attorney General Don Hanaway, "'sexual orientation' means 'having a preference for heterosexuality, homosexuality or bisexuality, having a history of such preference or being identified with such preference.'"

Therefore, discrimination based on sexual orientation includes discrimination based on whether a person has "homosexual tendencies,

interests or desires." This includes discrimination against people who identify themselves as gay, whether they engage in sexual activity or not. Even a cursory examination of the relevant Army, Navy or Air Force regulations clearly shows that discrimination based on sexual orientation occurs in the Armed Forces. This discrimination is not required by federal law, it is just current Department of Defense policy.

This discrimination has been ruled unconstitutional in *Ben-Shalom vs. Secretary of the Army*. Apart from its constitutionality, its wisdom has been questioned by Judge Anthony Kennedy, the Faculty Senate of the University of Massachusetts, the University of Wisconsin Board of Regents, the Academic Senate of San Jose State University and many others. Some people have questioned whether discrimination based on sexual orientation in the military could be ended without changing federal law. As can be seen from the definition of sexual orientation, the answer is yes. The federal law prohibiting 'sodomy' could remain, and people, whether they are heterosexual or homosexual in orientation, would have to obey this law. Lesbian and gay people are just as capable of abstaining from sexual activities as anyone else.

#### Rationale for discrimination

The position of the Armed Forces regarding the issue of homosexuality is as follows:

Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security.

No studies or any type of proof is available for any of these claims. The most frequently used arguments for discrimination are those related to 'discipline' and 'morale' in the Military Services. The argument is that since there are many homophobic people in the military, morale would decrease if lesbians and gays were allowed to serve. Also, the argument is made that these homophobic people would not want to be led by a gay person. These arguments are strikingly similar to arguments by many people a few decades ago supporting racial segregation. Many people, including Kenworthy, defended this policy, "Integration would lower morale and impair efficiency. Whites just will not serve with

blacks. The Army must take the country as it is...[We are] not an instrument for social experimentation." (from the Annals of the American Academy of Political and Social Science) This discrimination was ended in 1948 by an executive order of President Truman.

There is only one known study that any of the Armed Forces has conducted in order to examine exclusion based on sexual orientation. The report was written from the Navy, and is called the Crittenden report. The 656-page report was written just after the McCarthy era, in 1957. In addition, its task was not to investigate whether lesbians and gays should be kept out of the military, but how. Despite this, the committee writing the report still had to acknowledge that they had encountered no evidence whatsoever indicating that gays or lesbians were more of a security risk, more susceptible to blackmail, etc. than heterosexuals.

Just as the existence of racism in the military has been rejected as a justification for racist policies, the existence of homophobia in the military as a justification of homophobic policies should also be rejected.

#### Land Grant Obligation

On July 2, 1862, a federal law known as the Morrill Act was passed. This law established guidelines for states receiving federal aid from the Act. It requires the maintenance of:

...at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life. [emphasis added]

The requirement regarding military tactics, just one among a number of studies that must be available at Land Grant colleges, is often misrepresented to mean that ROTC is required by the Morrill Act. Since ROTC was established in 1916, 44 years after passage of the Morrill Act, this argument is easily refuted. Concern about how to satisfy the military tactics portion of the Act has been augmented by the fact that often the entire relevant portion of the Act, especially the portion underlined above, is not cited. The Act provides for guidance of state legislatures with regard to compliance to its requirements. If the University of Wisconsin-Madison were to choose not to renew its ROTC contracts, it is certain that there would be many state legislators who would be willing to work with the University to set up a non-discriminatory program. Among those who would certainly be favorably disposed to help the University in this regard are the thirteen legislators who signed a letter to the UW-Madison Faculty

Senate regarding ROTC. (It is important to remember that if the state legislature did have to address this issue, they would not be deciding whether to support gays in ROTC, but rather how UW-Madison should fulfill its land grant obligations, given that it has decided not to renew ROTC contracts.)

### Federal Research Grants

The important concern of loss of federal research grants depending on what decision the University makes with regard to ROTC has been carefully researched. Unfortunately, this issue has been somewhat distorted by misleading information. Some have cited Public Law 92-436, Sec. 606 as indicating that the University would suffer cutoffs of Department of Defense funds if it chooses not to renew its contracts with ROTC. This is an incorrect reading of this law. The law very clearly states that:

No part of the funds appropriated pursuant to this or any other Act for the Department of Defense or any of the Armed Forces may be used at any institution of higher learning if the Secretary of Defense or his designee determines that recruiting personnel of any of the Armed Forces of the United States are being barred by the policy of such institution from the premises of the institution... [emphasis added]

Recruiters can visit a campus with or without the presence of an ROTC program. The ad hoc committee investigated the federal policy and precedent on the distinct issue of ROTC on college campuses. It found no reason to expect cutoffs of research grants because of what the University chooses to do with regard to ROTC. In fact, a Foreign Affairs Analyst from the Congressional Research Service noted that, "According to the Defense Department's Office of Educational Policy and the Director of Legislation and Legal Policy, there has never been any legislation or official policy covering schools with defense contracts that have dropped their ROTC programs."

The University should not ignore its principles because of the threat of blackmail, especially if this threat is almost nonexistent.

### Bronson LaFollette's opinion

In 1983, then Attorney General Bronson LaFollette issued an advisory opinion stating that Wisconsin State law prohibiting discrimination based on sexual orientation is not applicable to the ROTC program. This is because state laws do not apply to federal programs. It means that the University of Wisconsin is not prohibited from entering into ROTC contracts. It does not, however, mean that UW campuses cannot voluntarily choose not to renew their ROTC contracts with the Army, Navy and Air Force. Indeed, the Faculty Senate of UW-Madison has affirmed that although "the laws of the State of Wisconsin do not affect the federal government or its agencies, the University remains at liberty to

promulgate its own rules and regulations apart from the laws of Wisconsin" (Fac. Doc. 542).

#### Loss of opportunity for heterosexual students and loss of benefit to the University from ROTC programs

Some people have emphasized that loss of ROTC on campus would be a loss of opportunity for heterosexual students and loss of money for the University. However, as 13 legislators pointed out in a letter to the faculty senate:

We understand that if the ROTC program were ultimately terminated on the UW-Madison campus, some truly needy students will be adversely affected. But we feel that allowing a program to continue because some individuals gain while others are denied assistance and unjustly discriminated against is wrong. We wonder if the Faculty Senate would stand for a scholarship program reserved only for whites just because those white students need the assistance.

As for over-emphasis on loss of monetary benefits to the University from the ROTC program, the loss would not have to be as much as the current cost of ROTC's military training on campus. If a new, non-discriminatory program were created, there is no reason that it would have to cost as much as the ROTC's military training is costing now. Most of the federal money allegedly benefiting "the University community" from ROTC actually goes toward salaries of ROTC military officers. The most important objection to the over-emphasis on the issue of money is that the University should not be "bought off" or willing to set aside its commitment to equal opportunity if it receives enough money. Should civil rights carry a price tag?

#### University responsibility

Some have claimed that the issue of discrimination in ROTC is of no concern to the University and that nothing needs to be done. They argue that the University should not take positions on issues that are "not part of the mission of the University" and that only availability of classes is relevant to University nondiscrimination laws. These people sometimes try to separate the class portion of the ROTC program from all other parts. This is only an artificial separation, however. The purpose of the classes in the ROTC departments is preparation for advanced stages of the ROTC program, which are discriminatory. Lesbian and gay students are prohibited from all other aspects of the ROTC program (see above). Students enrolling in ROTC are asked personal questions regarding their sexual behavior, and "interests and desires." At the very least, the University is being forced to be a party to discrimination; to cooperate with it.

The argument that discrimination issues are irrelevant to the mission of the University is equally specious. Included in the mission of the University is the idea that we live in a pluralistic society, one that should accept differences. Rejection of prejudices such as racism, sexism, homophobia and anti-Semitism should be included in the mission. Part of the educational function of the University is to promote an understanding of these issues, for the advancement of equal opportunity and for the benefit of society as a whole.

**Military madness***ROTC commander faults free speech***Wednesday's column***Random thoughts on Super Bowl XXII***Sunny skies***Warming temperatures*

# The Daily Cardinal

free every weekday

wednesday, january 27, 1988

university of wisconsin-madison

## 'Radical' image hurts ROTC recruiting

**By Debra Lewis**  
OF THE CARDINAL STAFF

The "radical" campus atmosphere, created by concerns over gay rights, budget cuts, the CIA and U.S. policy in Central America, makes the University unattractive to armed forces recruits, according to a high-ranking Naval Reserve Officers' Training Corps official.

In letters to former Acting Chancellor Bernard Cohen and Vice President of Academic Affairs Eugene P. Trani, Capt. D.M. Kletter, commanding officer of Naval ROTC and naval science professor, said negative media coverage of the University is making it difficult to recruit NROTC participants.

Kletter wrote to Cohen last spring: "Articles that profess we cater to the extreme left, homosexuals and the like are beginning to bother me and undermine our efforts to sustain the officer education program...regent support for another re-examination of the ROTC discrimination issue makes us look like the University administration supports the gay community."

Neither Cohen nor Kletter could be reached for comment

Tuesday. But in response to Kletter, Cohen wrote, "I appreciate your concern about the impact of adverse publicity on enrollments in our ROTC units. But neither you nor I can do very much that would change the prevailing definition of 'news' in our newspapers or the interests or even the ideologies of our students and faculty members...you should not expect miracles from the press, given the 'news values' that have raised this issue in the first place!"

Chancellor Donna E. Shalala, reached late Tuesday evening, declined to comment, saying she had not read the correspondence.

In his letter to Trani, Kletter suggested the University needs "a more active public relations effort to counteract the negative publicity the University has received." Bright students interested in the ROTC program shun the University because "in their own words, it's too liberal."

Moreover, referring to the University's "brain drain" problem, Kletter said the University could "offer discounts on student housing or cash awards to be applied toward living ex-

penses for top high school graduates who already have won other academic scholarships."

According to Lt. Col. John Riley, chairperson of the Army military science program, said he does not want the University "undermining" the ROTC program. "We want to know the degree to their support because it leaves uncertainty," he said.

"We must maintain a certain enrollment or the program could be eliminated. We are challenged to recruit," said Riley, echoing Kletter's concerns about the difficulty of bringing potential recruits to the University.

The Faculty Senate is scheduled to discuss the ROTC's gay discrimination policy, and whether to follow an ad-hoc committee's recommendation to take steps to change the policy.

The Senate's executive body, the University Committee, is expected to suggest further investigation of the issue in Congress and the courts.

See related editorial, page 5

## ROTC's revenge Navy names its enemies

The Reserve Officers' Training Corps program is in trouble.

We're not exactly saddened by the news. ROTC has been an important mechanism through which the military has penetrated University life. In a period of severely curtailed financial assistance, the armed forces have stepped into the breach with tuition relief, loan deferments and other programs. Many students have been forced to rely on military resources, bargaining away their personal autonomy and possibly their lives in exchange for higher education.

### TODAY'S EDITORIAL

#### The Staff Opinion

In correspondence to high-level University officials last year, Capt. D. M. Kletter, commanding officer of the Naval ROTC, reported that the ROTC program has suffered setbacks in its efforts to attract qualified Wisconsin ROTC scholarship recipients to our University. To explain the failure, he targeted activities on campus, and media coverage of them, which project an image of this University as a "radical hotbed."

In a letter to then-Acting Chancellor Bernard Cohen last spring, Kletter wrote, "Articles that profess we cater to the extreme left, homosexuals and the like are beginning to bother me and undermine our efforts to sustain the officer education program." He cited a *Daily Cardinal* news story about a proposed gay studies course which, he said, together with regent support for re-examination of the ROTC discrimination issue, "makes us look like the University administration supports the gay community."

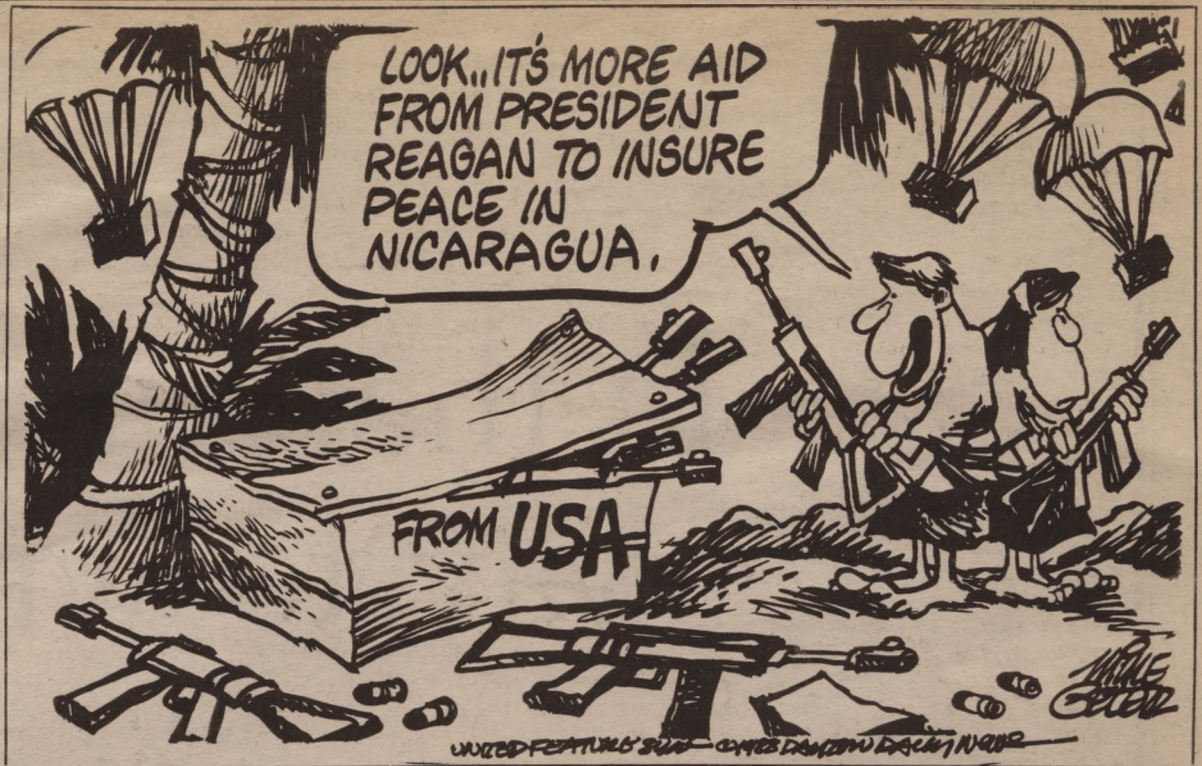
In a letter written last fall to Vice President of Academic Affairs Eugene Trani, Kletter again named some "detractors" to the ROTC recruitment effort. Among them were "(m)inority, but persistently outspoken campus actions against ROTC, vis a vis continual attacks on the programs by groups with anti-government motives and interests such as anti-CIA demonstrations, last year's unexpected Regent support of gay-rights rather than ROTC, continued Faculty Senate studies aimed at removing ROTC programs from this campus, etc."

Apparently, then, ROTC's problems are due to the exercise of freedom of speech and freedom of the press. Is Kletter calling upon the University to take steps to curb those freedoms, so that the military presence may flourish on campus with greater comfort and appeal? Is he suggesting that student activism and media coverage of relevant issues be quashed? Is he challenging academic offerings which conflict with military priorities?

Kletter's obsession with gay issues is no surprise given ROTC's existing policy of discrimination, which prohibits gays and lesbians from achieving cadet status in the ROTC program and from obtaining officer commissions. For him, gay studies courses would inhibit the growth of ROTC; faculty investigation of ROTC policy, in light of state law and University regulations against discrimination on the basis of sexual orientation, would give ROTC negative publicity; and gay rights and ROTC are mutually exclusive.

Kletter's remarks have a proper place in the current debate around the issue of ROTC discrimination. We've heard much talk about whether gay or lesbian sexual orientation "interferes with the military mission." What else does the military believe constitutes "interference"?

The captain seems to have forgotten that the ostensible purpose of the military is to protect the basic freedoms which we enjoy and exercise. He may have foregone his constitutional rights when he entered the military, but we have not. No one who believes that the University should subvert its mission and goals to those of the military has a right to teach on this campus.



## Jarvis showdown stifles students

So John Jarvis wants to be a student regent.

That's understandable. It can't hurt to rub elbows with the state's industry biggies and the University's power elite. Jarvis does have his career to think about, after all.

But what about his Grand Appointer, Gov. Tommy Thompson? Does he truly want Jarvis to be a student regent? Let's review the facts.

### JORDAN MARSH

As Wisconsin Assembly minority leader, Thompson lobbied heavily against the student regent position when it was first proposed more than two years ago. He voted against the bill on three separate occasions.

We can, I think, reasonably deduce that he does not believe in the value, or the validity, of a student representative sitting on what some consider to be the most powerful body in the UW System.

Hence, John Jarvis.

Fred Luber, chairperson of the Super Steel Products Corporation, where Jarvis works in taxation, was a large contributor to Thompson's gubernatorial campaign. Coincidence? Heh, heh. You decide.

Speaking of Jarvis, let's review some of *his* facts:

- He has never served in student government. But that's OK, he says, because neither have most UW System students. Of course, most UW students don't aspire to be regents, either.

- To adequately represent students, one must first *be* a student. During the four years prior to last fall, this "average run-of-the-mill student" had been enrolled in school for only two semesters—part-time. He registered as a full-time student only two days before he was appointed by Thompson. Coincidence? Heh, heh. You decide.

- On the subject of increased tuition this year, Jarvis has said, "I would have supported it...It was about time the students were asked to pay an extra proportion."

- As president of the Chi Psi fraternity while an undergrad at the UW-Madison, he could not understand why minorities didn't knock down the doors to join his fraternity.

- Jarvis saw nothing wrong with the "Fiji Island" party here last April, where Phi Gamma Delta fraternity members erected a caricature of a Black man with a bone through his nose. Racism? What racism?

John "What's the big deal?" Jarvis feels that his work at Super Steel gives him a "unique perspective" on student needs. Of course. He's a tax accountant. That's one hell of a unique perspective.

Last fall, the issue became super-hot and Thompson's

reputation—and ego—were put on the line. The State Senate Education Committee, sensing Jarvis' obvious lack of experience with and sensitivity to student issues, gave him an unfavorable recommendation after asking Thompson to withdraw the nomination.

Suddenly, four Democratic senators publicly declared themselves in favor of Jarvis. You don't have to spell it out for me; I'm from Chicago. Tommy "Mayor Daley" Thompson doesn't want to lose this one, and we all need some executive favors now and then, right?

Like Thompson, Sen. John Norquist, D-Milwaukee, opposed the existence of the student regent position in the first place. And he agrees completely with Jarvis' views, including support for tuition hikes. As if Jarvis is supposed to represent Norquist instead of the students. Norquist, incidentally, is running for mayor of Milwaukee—the city in which Super Steel is based—this year. Coincidence? Heh, heh. You decide.

Sen. Barbara Ulichny, D-Milwaukee, gives as her reason for supporting Jarvis the fact that the nominee is from her district. The hell with the students—he's her constituent, damn it!

With the additional support of Sens. Marvin Roshell, D-Chippewa Falls, and Lloyd Kincaid, D-Crandon, the final vote would be 18-15 in favor of Jarvis.

The vote on the Jarvis nomination, originally planned for July of 1987, was delayed by Sen. Joseph Czarnecki, D-Milwaukee, chair of the Education Committee, so that students would have a chance to express their views. Well, we did.

Eight UW System student governments, in addition to United Council, the official state student lobbying group, voiced their opposition to Jarvis. Student referendums across the state produced an overwhelming "no" to the Jarvis appointment.

But, despite Jarvis' statements that he would withdraw if he were voted down by students, he has stayed on. As it turns out, the Senate could have held the vote last July and saved everyone a lot of time and energy.

The students whom Jarvis will not represent do not want him; the governor whom he will represent does want him; and the senators who could use some political favors clearly do not give a damn.

We're being bought and sold at the State Capitol like sides of beef, and so is Jarvis. The only difference is that he gets the position on the Board of Regents, while we get the shaft.

The Jarvis vote is scheduled for Thursday. Students can voice their protest at a rally in the Capitol Rotunda at 12:30 p.m. today. All who are concerned about this travesty are urged to attend.

# ROTC/gay issue moves to UW Faculty Senate

By Anthony Shadid  
OF THE CARDINAL STAFF

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The controversy over the recent disclosure of high-level correspondence between former Acting Chancellor Bernard Cohen and Capt. D.M. Kletter will probably continue into the Faculty Senate meeting Monday.

In letters last year addressed to Cohen and Vice President of Academic Affairs Eugene P. Trani, Kletter, commanding officer of Naval ROTC, said negative news coverage of the University is damaging recruitment of potential NROTC participants.

"Articles that profess we cater to the extreme left, homosexuals and the like are beginning to bother me and undermine our efforts to sustain the officer education program," Kletter wrote.

Although administration officials declined to comment on the issue, the chances of the controversy spilling over into the Faculty Senate meeting Monday were very high, an administration official said.

"We don't believe we should in any way affect the debate on this issue," said Harry Peterson, executive assistant to the chancellor. "This whole subject needs to be dealt with at the Faculty Senate (meeting)."

The Faculty Senate is scheduled to discuss ROTC's policy of discrimination against gays Monday, and discuss whether to follow an ad-hoc committee's recommendation to modify the policy.

Because the two issues are related, comment on Kletter's letter may bias the debate, Peterson said.

Chancellor Donna E. Shalala said she had not read the letter, but said she "wouldn't be surprised" if the Faculty Senate takes up the issue.

Shalala will chair the meeting.

Barbara Fowler, chairperson of the University Committee, the executive branch of the Faculty Senate, said Kletter will most likely spark discussion of the letters at the meeting.

"I would be surprised if he weren't there," she said. "I don't doubt that people in the Navy program will raise it."

In addition, other government and University officials expressed opposition to the letter, but said little other action is planned.

"It's one thing to complain and raise an issue because they have their right to an opinion, but it's another thing to demand the opinions they don't like be suppressed," said Faculty Senate member Anatole Beck.

Beck said he expects the issue to be raised and handled by other Faculty Senate members.

Stuart Applebaum, an aide to U.S. Rep. Robert Kastenmeier, D-Sun Prairie, said although no action by Kastenmeier's office is planned, the basis of the letter is questionable.

"He shouldn't be in the position of advocating censorship," he said. "If he has some problems, it's his problem and not the problem of the University, students and press."